

Service Date: 8/27/9

DEPARTMENT OF PUBLIC SERVICE REGULATION
BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF MONTANA

| | | |
|--|---|------------------------|
| In the Matter of the Possible Adoption |) | UTILITY DIVISION |
| Of Rules Regarding the Proprietary |) | |
| Nature of Utility Executive Compensation |) | DOCKET NO. N2009.7.100 |

Comments of the Montana Telecommunications Association

Comes now the Montana Telecommunications Association (“MTA”) and files these comments in advance of a roundtable discussion of the possible adoption of rules regarding the proprietary nature of utility executive compensation. MTA represents some of Montana’s smallest and largest rural wireline telecommunications providers, half of whom are member-owned cooperatives and the other half are shareholder-owned commercial companies. MTA members have invested hundreds of millions of dollars in Montana’s telecommunications infrastructure and continue to invest tens of millions each year in new facilities and services serving primarily rural Montana. These companies provide access to broadband Internet service to over three-quarters, and often nearly 100%, of their customers. MTA members employ, with outstanding salaries and benefits, nearly 650 proud Montanans who are dedicated to their jobs, their communities and the state’s economic development.

I. Introduction

MTA commends the Commission for initiating a Roundtable and encourages the Commission to consider more opportunities to engage in open discussion with interested parties within the framework of a roundtable model. We look forward to participating in this Roundtable discussion on possible executive salary disclosure rules.

In general, MTA believes rules are not necessary. In fact, any rules likely will violate the balancing test which is necessary to reconcile the two Constitutional provisions regarding individuals' right to privacy on the one hand and the public's right to know on the other hand. Any prescriptive rule constitutes a foregone conclusion before a party has an opportunity to petition the Commission, effectively putting the cart before the horse. Parties facing a "closed door" at the Commission before they even present an argument for protection of proprietary, personal, sensitive information will be aggrieved.

II. Discussion

MTA will raise a number of concerns with a possible executive compensation disclosure rule. Among our concerns are the following.

Balancing test. As noted above, and in the Notice of Roundtable Discussion on Utility Executive Salary Disclosure Rules ("Notice"), "Montana judicial decisions and Attorney General Opinions" have established a balancing test to be applied when a conflict is present between the two Constitutional provisions regarding individual right to privacy and public right to know. A rule that does not honor a case-by-case determination of the merits of such a balancing test would pre-determine a result, denying due process to a party and violating the balancing test itself.

Precedent. While regulatory precedent is not immutable, it is important. A rule that turns upside down long-established precedent which respects individuals' right to privacy in salary disclosure matters would be disruptive, at the least and potentially result in unforeseen, unintended consequences.

As the Notice points out, current Commission rules require that:

- a regulated utility make "a reasonable effort to contact the individual to ascertain whether the individual waives the right to privacy..."
- "individuals with potential privacy interest have actual subjective expectations of privacy..."



- “society recognizes such expectations of privacy as reasonable; and
- “the demand of individual privacy clearly exceeds the merits of public disclosure.”

MTA sees no compelling reason to overturn these standards.

Definitions. The Notice indicates the Commission “questions whether any utility executive’s expectations that his/her compensation should be constitutionally protected are reasonable, or whether society accepts such expectations as reasonable.” The Notice defines “executive” (for purposes of the roundtable discussion) in terms of possessing a number of characteristics. The definition effectively describes anyone with any form of supervisory, budgetary or operational authority. Moreover, any director or shareholder who receives any compensation from an “interest in the company” would be considered an “executive.” Presumably, this definition was intended to limit the number of “executives” affected by any salary disclosure rule. If this is the intent, MTA doubts it will be satisfied by this proposed definition. In fact, MTA believes this definition will expand the class of covered employee beyond current policy.

Moreover, MTA questions why a salary disclosure rule should be limited at all to a particular class of employee, if the Commission believes that the public right to know supercedes any individual right to privacy. Why stop at “executives?” Doesn’t the public have a right to know all utility employees’ compensation (if one accepts the Commission’s questioning of whether society accepts any expectation of privacy in compensation matters)? Indeed, if, as discussed below, the Commission believes that disclosure of compensation is necessary to ensure just and reasonable rates, then executives’ salaries are less directly related to rates than other employees’ since the former often are allocated among a variety of regulated and non-regulated operations.

Expectations. MTA’s members are private companies that provide regulated telecommunications service. They are not government agencies whose employees’ salaries are funded entirely by taxpayer revenues. Employees of these companies, at any level, expect their compensation to be

held in confidence. Indeed, compensation information is held in strict confidence and any discussion of compensation often leads to disciplinary action. To reverse this longstanding expectation would set in motion a cascade of unintended consequences, making the smooth operation of business problematic. If the Commission wishes to broadcast employee compensation because of its obligation to ensure just and reasonable rates, then compensation is but a minor factor in a complicated equation. The Commission has already expressed its opposition to single-issue ratemaking; if it wishes to question the elements that comprise a regulated utility's rates, it should initiate a rate case. (MTA does not know what the Commission's intent is; so we're only surmising that one reason might be its interest in ensuring just and reasonable rates.)

Discrimination/Fairness. Disclosing some employee's compensation and not others' is discriminatory. Disclosing some companies' employee compensation while other similarly situated companies (e.g., cable, wireless, among others) escape such disclosure because they remain outside of the Commission's reach is discriminatory, unfair, and anticompetitive. Additionally, such disclosure can cause harm to utilities competing for limited management talent, which may opt to work for companies where such disclosure is not required. Or, companies could find their talent "cherry picked" by other competitors who, once able to view confidential compensation information, could structure more attractive compensation packages.

Rationale. The Montana Constitution provides that "the right of individual privacy is essential to the well-being of a free society and shall not be infringed without the showing of a compelling state interest." Mont. Const. Art. II, §10. In addition, the Montana Attorney General has opined that:

An individual's personal income has long been recognized as a matter of personal privacy. See 26 U.S.C § 6103 (income tax returns are confidential); § 15-30-303, MCA (state income tax information is confidential); *Application of Nicholas*, 458 N.Y.S. 2d 858, 859 (N.Y. Supp. 1983) ("New York has declared information pertaining to personal income a matter of personal privacy") 43 Op. Atty Gen. No. 25(1989).



Utility employees have a Constitutional right of privacy in their financial information, and the Commission has never before rejected that Constitutional privacy interest. *Article II, Section 10 of Montana's Constitution*. Montana Constitution's guarantee of privacy encompasses confidential "informational privacy." *St. James Community Hosp., Inc. v. District Court*, 2003 MT 261 ¶ 8, 317 Mont. 419 ¶ 8, 77 P.3d 534 ¶ 8, citing *State v. Nelson* (1997), 283 Mont. 231, 242, 941 P.2d 441, 448. Employee compensation is information that falls within the scope of the Montana Constitution's privacy protections.

Employees of utilities have an actual and subjective expectation of privacy in their personal financial records. If the Commission rejects its longstanding respect for this privacy interest, it must articulate compelling reasons for doing so.

III. Conclusion

MTA looks forward to discussing these concerns in greater detail at the Roundtable. Again, we commend the Commission's decision to initiate a Roundtable rather than launch a formal rulemaking. MTA strongly encourages the Commission to promote further such opportunities for parties to communicate with Commissioners, staff and other parties in a roundtable format.

Respectfully submitted,

Geoff Feiss, General Manager
Montana Telecommunications Association
208 North Montana Avenue, Suite 105
Helena, Montana 59601
406-442-4316
gfeiss@telecomassn.org

